Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court Of The United States
October Term, 2001

MICHAEL RUOTOLO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SECOND CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI (WITH ATTACHED APPENDICES)

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QUESTION PRESENTED FOR REVIEW

Whether the newly discovered evidence presented in this case warranted a new trial?

Whether the failure of the Criminal Investigation Division of the Internal Revenue Service to grant the Petitioner a conference violated Due Process?

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The summary opinion of the Second Circuit Court of Appeals affirming the judgment of the District Court is reported at __ F.3d __ (2d Cir. 2001). (Pet. App. at 1A-3A). The Petitioner filed a Petition For Panel Rehearing on June 4, 2001 with the Second Circuit Court of Appeals which was denied on July 18, 2001. It is reprinted in Petitioner's Appendix at 4A-22A. The District Court's decisions on the two issues now raised are reprinted in the Petitioner's Appendix at 25A-32A.

BASIS FOR JURISDICTION

The opinion of the Second Circuit Court of Appeals was reported on April 10, 2001. See Pet. App. at 1A-3A. The Petitioner's Petition For Panel Rehearing was denied on July 18, 2001. See Pet. App. at 23A-24A.

The Petitioner is relying upon Rules 10 et seq. of the Rules of the Supreme Court of the United States in filing this petition. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254 ("Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree").

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISION INVOLVED

26 U.S.C. SECTION 7201

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

A. Introduction

This petition raises two important questions: (1) whether the newly discovered evidence offered by the Petitioner warranted a new trial; and, (2) whether the failure of the Criminal Investigation Division of the IRS to offer the Petitioner a conference violated his due process rights.

B. Facts Material To The Consideration Of The Question Presented.

The Petitioner was tried and convicted on three counts of income tax evasion, in violation of 26 U.S.C. § 7201, following a jury trial in 1996. At the trial, the Petitioner represented himself pro se. In January of 1999, the Petitioner was sentenced to three months on each count, with the sentences to be served concurrently. A panel of the Second Circuit Court of Appeals (Oakes, Kearse and Cabranes) affirmed the conviction and sentencing in a summary order filed on April 10, 2001. The Petitioner filed a Petition For Panel Rehearing on June 4, 2001. (Pet. App. at 4A-22A). This was denied on July 18, 2001. (Pet. App. at 23A-24A).

Prior to the Petitioner's trial, he moved to dismiss the indictment pending against him on the grounds that he was not afforded a Criminal Investigation Division Conference ("CID Conference") by the Internal Revenue

Service ("IRS") despite his request for such a hearing. (Pet. App. at 27A-32A). The District Court concluded that the Petitioner's Due Process rights had not been violated by the failure of the IRS to provide him with a hearing. Additionally, the Petitioner, prior to his sentencing, moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. This Motion was based on the testimony/report of Dr. Walter Borden, who testified regarding the Petitioner's psychological condition as it related to his "willfulness" in committing this crime. (Pet. App. at 33A-35A). This Motion was also denied by the District Court. (Pet. App. at 25A-26A).

ARGUMENT AMPLIFYING THE REASONS FOR GRANTING THE WRIT

This Petition for Writ of Certiorari should be granted because the Second Circuit Court of Appeals has decided this case in a way which allows the District Court to depart from the accepted and usual course of judicial proceedings. Additionally, the decision of the Second Circuit Court of Appeals has denied the Petitioner (1) his right to due process in connection with the failure to grant a new trial; and, (2) his right to due process in connection with the failure of the IRS to provide him with a CID conference.

Before the Second Circuit, the Petitioner argued that he was entitled to a new trial on the basis of newly discovered evidence, namely, the psychiatric evaluation performed by Dr. Walter Borden. In responding to this claim, the Government argued that: (1) the evidence offered was not so material that its admission would probably lead to an acquittal; and, (2) that the evidence could have been discovered prior to or during the Petitioner's trial. The Second Circuit Court of Appeals, in a Summary Order, concluded that, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, the District Court (Squatrito, J.), did not abuse its discretion in denying the Petitioner's Motion for a New Trial. The Second Circuit Court of Appeals concluded, in its unpublished opinion:

We are unpersuaded that the psychiatric testimony

> proffered by Ruotolo after trial could not have been developed in time for its presentation at trial. Nor do we think there is any likelihood that that evidence, which was aired at a posttrial evidentiary hearing, would result in an acquittal.

(Pet. App. at 3A). The ruling of the Second Circuit does not recognize the true nature of the evidence offered by the Petitioner. This Court should grant Certiorari to properly consider the Petitioner's claim.

In order to grant a motion for new trial based on newly discovered evidence, a court must conclude that "the evidence is material to the verdict, could not with due diligence have been discovered before or during the trial and is not cumulative." United States v. Petrillo, 237 F.3d 119, 123 (2d Cir. 2000). In affirming the District Court's denial of the Petitioner's motion, the Second Circuit Court of Appeals concluded that: (1) the testimony could have been developed in time for its presentation at the Petitioner's trial; and, (2) there was no likelihood that the evidence would have resulted in an acquittal. Because each of these conclusions is incorrect, the Petitioner's Petition for Certiorari should be granted.

It is important to consider the nature of the testimony which Dr. Borden was prepared to offer at a new trial and did, in fact, offer at the hearing on April 28, 1998. According to Dr. Borden, the Petitioner suffers from "[m]asked depression ... with a mixed personality disorder with obsessive compulsive, paranoid and

avoidant traits." (Pet. App. at 33A). The disorder is how the Petitioner, according to Dr. Borden, deals with stress.

Dr. Borden went on testify at the hearing that:

> ... it's like on the one hand he's so obsessive that every detail is important and he doesn't differentiate. And you get so many details that after a while he can't organize it. On the one hand you get that. On the other hand, it's like important details he doesn't consider. And it's like he doesn't include.

(Pet. App. at 33A). Dr. Borden eventually testified that the Petitioner's mental state had been a contributing cause to the commission of the tax offenses. (Pet. App. at 34A). At the hearing, Dr. Borden discussed the issue with the Court as follows:

> Court: In looking at that, based on everything you've said ... tell me whether or not Mr. Ruotolo suffered from a diminished capacity that contributed to the offense in question here, which is the failure to properly document or truthfully give information on a 1988, 1989 and 1990 income tax returns?
>
> The Witness: Yes, and that's the -- really the exact wording that I would use, that it contributed. It wasn't the sole cause, but it did --.

Court: It's not a but for.

The Witness: Right. It's a [contributing] factor that -- in that it diminished his capacity to realistically totally assess his situation and his tax situation.

Court: How do you quantify his mental status per the guidelines as stated here? What are the words the guideline uses there, sir? Significant?

The Witness: It says if the defendant committed nonviolent offense suffering from significantly reduced mental capacity, and I would say that his mental capacity was significantly reduced, and constituted a contributing but not a sole factor to the commission of the offense, that -- it was significantly reduced.

(Pet. App. at 35A-36A).

To prevail on a motion for new trial on the grounds of newly discovered evidence, the Petitioner must show that the evidence could not have been discovered and presented prior to or during his trial. Petrillo, 237 F.3d at 123. In the instant matter, the Second Circuit Court of Appeals found that the evidence proffered by the Defendant could have been developed in time for its presentation at trial. Because this conclusion is incorrect, this Court should grant the Petitioner's Petition for Certiorari.

Before the Second Circuit, the Petitioner compared his case to the case of Nagell v. United States, 354 F.2d 441 (5th Cir. 1966). In Nagell, the defendant was granted a new trial after it was determined that he, unbeknownst to both the district court and his attorneys, suffered from Anton's disease. That disease caused him to both deny that he suffered from any mental illness and to do anything he could to misled others regarding his mental disease. Id. at 448. Evidence regarding this disease was not fully explored until a post-conviction, full evidentiary hearing regarding the defendant's motion for a new trial. Id. at 446. In that case, the Fifth Circuit Court of Appeals concluded that:

> As a result of the newly discovered evidence, which the defendant concealed as a result of a damaged brain and a diseased mind, three doctors ... are now prepared to testify that in their opinions [the defendant] did not know the difference between right and wrong. This puts an entirely different face on the matter. Of course, we do not decide the merits of the case, but we believe another jury should have an opportunity to decide the guilt or innocence of this man in the light of this new evidence.

Id. at 449.

In the instant matter, a similar factual scenario has presented itself. The Petitioner, according to Dr. Borden's

testimony "has, for all practical purposes, no significant awareness of his underlying psychological problems." (Pet. App. at 34A-35A). This lack of self-awareness prevented the Petitioner from employing this evidence properly at his trial. The Petitioner was unaware that he had any problem of a psychological nature, and was therefore unable to explore how such a problem would impact his criminal culpability. Additionally, when this evidence is considered in light of the testimony presented at the Petitioner's trial, it "puts an entirely different face on the matter." Nagell, 354 F.2d at 449. No evidence was offered to the jury regarding the Petitioner's psychological condition. In this matter, the Petitioner, acting as his own attorney, was unaware of the very problem which was a significant factor in his allegedly criminal behavior. Therefore, the Second Circuit Court of Appeals and the District Court erred in concluding that the Petitioner should have been aware of this evidence in time to employ it at his trial.

Pursuant to Nagell, this Court should conclude that the new evidence produced by the Petitioner warranted a new trial. Accordingly, this Court should grant the Petitioner's Petition for Certiorari.

This evidence, if presented at the Petitioner's trial, would have severely undermined the Government's argument regarding the willfulness of the Petitioner's conduct. Therefore, the evidence would have been likely to lead to an acquittal of the Petitioner.

In Cheek v. Untied States, 498 U.S. 192, 201 (1991), the United States Supreme Court considered the issue of proving "willfulness" under the tax evasion statutes. In considering proof of willfulness, the Court stated:

> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty ... if the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the knowledge component of the willfulness requirement. But carrying this burden requires negating a defendant's claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws ... In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable. In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however

unreasonable a court might deem such belief.

Id. at 201-02.

If Dr. Borden's testimony had been presented at trial, he would have bolstered the Petitioner's claim regarding his misunderstanding of the tax laws. This would have substantially increased the likelihood of the jury concluding that the Petitioner was honestly mistaken in his misunderstanding of the tax laws. The jury would have understood that the Petitioner was a workaholic, but, nevertheless was unaware of many of the details underlying his work. The jury would have been in a much better position to consider the Petitioner's specific psychological make up and how such a mental state affected the Petitioner's ability to properly process and file his income tax returns. Additionally, this testimony would have placed the Petitioner's claims regarding his misunderstanding of the tax laws in the proper focus. It is highly probable that the introduction of Dr. Borden's testimony at the Petitioner's trial would have resulted in an acquittal. Therefore, this Court should grant the Petitioner's Petition for Certiorari.

Additionally, the Second Circuit Court of Appeals erred in concluding that the failure of the Internal Revenue Service to grant the Petitioner a CID conference did not violate his due process rights. In this matter, the Petitioner requested a Criminal Investigation Division ("CID") Conference with the Internal Revenue Service, pursuant to Internal Revenue Service's Statement of Procedural Rules

5 § 301.552. That request was made on March 4, 1993. This conference was postponed by mutual agreement until information regarding the audit/investigation of the Petitioner requested pursuant to the Freedom Of Information Act ("FOIA") was received from the IRS. While both sides were awaiting this information, the Petitioner's case was transferred to the IRS-District Counsel level with a recommendation that the Petitioner be prosecuted for willful attempted evasion of income taxes for the years 1988, 1989 and 1990. A hearing was never held at the CID level, nor was the Petitioner ever again offered the opportunity to have a hearing held at the CID level. This denial of such a hearing violated the Petitioner's Due Process rights, and therefore, his Petition for Certiorari should be granted.

The Internal Revenue Service's Statement of Procedural Rules under 5 § 301.552 states that:

> A taxpayer who may be the subject of a criminal recommendation will be afforded a District Criminal Investigation conference when he requests one or where the Chief, Criminal Investigation Division, makes a determination that such a conference will be in the best interests of the Government.

See 26 C.F.R. § 601.107(b)(2).

While this rule "[i]s not an officially promulgated regulation but only a statement of procedure," United

States v. Thomas, 593 F.2d 615, 622 (5th Cir. 1979); nevertheless, the one mandatory aspect of the regulation is "that taxpayers under criminal investigation have a right to a conference, if they so request." Einhorn v. DeWitt, 618 F.2d 347, 348-49 (5th Cir. 1980). In discussing the obligations imposed on the IRS by the CID procedures, one Court has stated:

> The sole obligation imposed on the IRS by § 601.107(b)(2) - and the only corresponding right that could be said to be conferred on taxpayers - is the granting of a district intelligence conference at the request of the taxpayer. The district intelligence conference is primarily for the convenience of the Internal Revenue Service so that it may orderly process potential criminal cases and segregate those not warranting prosecution. At least one of the purposes of the conference is to begin an informal 'give and take' process ...

John Doe Corp. v. Miller, 499 F. Supp. 378, 381 (E.D.N.Y. 1980). In considering the Petitioner's claim on appeal, the Second Circuit Court of Appeals concluded that "Ruotolo was afforded the opportunity to attend a CID conference and that he instead sought an indefinite postponement." The Court went on to state that the District Court had "properly concluded that the IRS's denial of his request for such a postponement did not violate his due process rights." (Pet. App. 3A). These conclusions ignore the main thrust of the Petitioner's argument on appeal - the failure to provide a CID

conference violated his Due Process rights. Therefore, the Petitioner respectfully requests that his Petition for Certiorari be granted.

The Petitioner respectfully submits that this is an issue of first impression in the Second Circuit Court of Appeals, and as such it was incorrectly decided. In reaching its conclusion that no Due Process violation occurred, the District Court relied on two cases, United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975) and United States v. Goldstein, 342 F. Supp. 661 (E.D.N.Y. 1972). See United States v. Ruotolo (Def. App. at 27A). Because each of these cases is distinguishable from the instant matter, this Court should grant the Petitioner's Petition for Certiorari.

In United States v. Stofsky, 527 F.2d at 249, the Court considered an argument similar to the one now raised by the Petitioner, and concluded that:

> The failure of the government to afford [the defendants] an administrative conference with the IRS before indictment did not nullify the grand jury actions. The grand jury's broad powers to investigation and indict on the basis of the evidence which disclosed reasonable grounds for belief that the defendants violated 26 U.S.C. § 7201, are not conditioned on the taxpayers being given an opportunity to explain their conduct to a government official any more than to the grand jury itself.

Id. at 249 (internal citations and quotations omitted). The Court then went on to note that "the IRS regulation providing for such administrative conferences, 26 C.F.R. § 601.107(b)(2), was not in effect at the time of the filing of the indictment." Id. The lack of this regulation distinguishes Stofsky from the instant matter. At the time the Petitioner requested his CID Conference, the IRS, pursuant to the operation of 26 C.F.R. § 601.107(b)(2), was obligated to provide the Petitioner with such a conference. When the Stofsky Court considered a similar claim the Court concluded that the regulation was not effective at the time of the indictment, and therefore there was no corresponding right to such a conference. However, in the instant matter, a regulation was in effect which affirmatively provides the Petitioner with the right to a CID conference whenever such a conference is requested. The Government, in failing to provide the Petitioner with a hearing which it affirmatively provided for, violated the Petitioner's due process rights. A contrary determination, based on factually distinguishable cases, should not be allowed to stand. Therefore, this Court should grant the Petitioner's Petition for Certiorari.

Additionally, the District Court improperly relied on United States v. Goldstein, 342 F. Supp. 661 (E.D.N.Y. 1972) in support of its conclusion that the Petitioner's due process rights were not violated by the failure to provide him with a CID Conference. In Goldstein, the defendant did not rely on the Code of Federal Regulation which the Petitioner in this case relied

on. Instead, the defendant in Goldstein requested conferences with the special agent involved in the case and the Regional Commissioner Intelligence. Id. at 664. The Court noted that these conferences were discretionary and the later conferences were "described in manuals (for official use only), and [were described] in terms of practice or discretion." Id. (emphasis added). In the instant matter, the conference to which the Defendant was entitled was mandatory. Therefore, the Goldstein case is inapposite to this matter, and should not have been relied on by the District Court. Accordingly, the Petitioner's Petition for Certiorari should be granted.

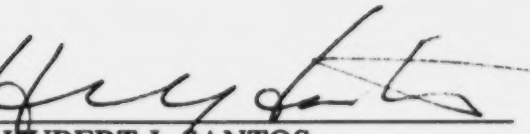
The IRS has created a procedure whereby a taxpayer is afforded, upon his request a CID conference. See 26 C.F.R. § 601.107(b)(2). Such conferences, while mainly being conducted for the benefit of the IRS, are also designed to provide "the taxpayer with substantial protection against the hasty or overzealous judgment of the special agent." United States v. LaSalle National Bank, 437 U.S. 298, 315 (1978) (noting importance of protections and discussing method of obtaining a hearing). The Government, without ever informing the Petitioner of their intention to do so, simply forfeited the Petitioner's hearing on the grounds of expedience. The Petitioner was never informed that he would lose the right to this hearing if it he did not take advantage of it within a certain time frame. No waiver can be implied in such a case. See Moser v. United States, 341 U.S. 41, 47 (1951) ("Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent

waiver is required by elementary fairness. To hold otherwise would be to entrap petitioner"). In the instant matter, the Petitioner's due process rights were violated when his CID hearing was not conducted. Therefore, this Court should grant the Petitioner's Petition for Certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Second Circuit Court of Appeals should be granted.

THE PETITIONER,

BY 

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 10th day of April, two thousand one.

Present: HONORABLE JAMES L. OAKES,
HONORABLE AMALYA L. KEARSE,
HONORABLE JOSE A. CABRANES,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

- v.- No. 99-1088

MICHEAL C. RUOTOLO,

Defendant-Appellant

Appearing for Appellant: Robert E. Nicholson, Brooklyn, N.Y.
Appearing for Appellee: Jonathan Biran, Ass't U.S. Att'y, D. Conn. New Haven, CT

Appeal form the United States District Court for the District of Connecticut.

This cause came on to be heard on the record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Defendant Michael C. Ruotolo appeals from a judgment entered in the United States District Court for the District of Connecticut in January 1999, following a jury trial in 1996 before Dominic J. Squatrito, Judge, convicting him on three counts of income tax evasion, in violation of 26 U.S.C. §7201, and sentencing him principally to three months imprisonment; his sentence has been stayed pending this appeal. On appeal, Ruotolo argues that his due process rights were violated because he was not granted a conference by the Criminal Investigation Division ("CID") of the Internal Revenue Service ("IRS"), and that the district court abused its discretion in denying his motion for a new trial based on newly discovered evidence as to his mental state at the time of his failure to report substantial

amounts of income. Finding no merit in these contentions, we affirm.

The district court found, *inter alia*, and the record confirms, that Ruotolo was afforded the opportunity to attend a CID conference and that he instead sought an indefinite postponement. The court properly concluded that the IRS's denial of his request for such a postponement did not violate his due process rights.

Nor is there merit in Ruotolo's contention that it was an abuse of discretion, *see, e.g., United States v. Gallego*, 191 F.3d 156, 161 (2d Cir. 1999), *cert. denied*, 120 S.Ct. 2220 (2000), for the district court to deny his motion pursuant to Fed.R.Crim.P. 33 for a new trial. Such relief is justified only if the newly proffered evidence (a) could not have been discovered through the exercise of due diligence before or during trial, and (b) is so material that its admission would probably lead to an acquittal. *See, e.g., United States v. Gallego*, 191 F.3d at 161. We are unpersuaded that the psychiatric testimony proffered by Ruotolo after trial could not have been developed in time for its presentation at trial. Nor do we think there is any likelihood that that evidence, which was aired at a posttrial evidentiary hearing, would result in an acquittal.

We have considered all of Ruotolo's contentions on this appeal, including those advanced in papers filed by Ruotolo *pro se* and treated as a brief, and have found them to be without merit. The judgment of the district court is affirmed. The mandate shall issue forthwith.

DEFENDANT'S PETITION FOR PANEL REHEARING

In accordance with Rule 40 of the Federal Rules of Appellate Procedure, the Defendant-Appellant, Michael Ruotolo hereby petitions this Court for a panel rehearing.

I. Procedural History of the Case

The Defendant was tried and convicted on three counts of income tax evasion, in violation of 26 U.S.C. § 7201, following a jury trial in 1996. At the trial, the Defendant represented himself pro se. In January of 1999, the Defendant was sentenced to three months on each count, with the sentences to be served concurrently. A panel of this Court (Oakes, Kearse and Cabranes) affirmed the conviction and sentencing in a summary order filed on April 10, 2001.

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Defendant hereby petitions this Court for a panel rehearing. Because the Summary Order issued by this Court on April 10, 2001, involved issues of great importance which were not fully addressed by that Summary Order, the Defendant respectfully submits that he is entitled to a panel rehearing.

II. Relevant Factual Background

Prior to the Defendant's trial, he moved to dismiss

the indictment pending against him on the grounds that he was not afforded a Criminal Investigation Division Conference ("CID Conference") by the Internal Revenue Service ("IRS") despite his request for such a hearing. See Defendant's Brief at 34 (hereinafter "Def. Br. at __"). The District Court concluded that the Defendant's Due Process rights had not been violated by the failure of the IRS to provide him with a hearing. Def. Br. at 38. Additionally, the Defendant, prior to his sentencing, moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. This Motion was based on the testimony/report of Dr. Walter Borden, who testified regarding the Defendant's psychological condition as it related to his "willfulness" in committing this crime. Def. Br. at 25-8. This Motion was also denied by the District Court. Def. Br. at 22-3.

II. Legal Argument

A. This Court Incorrectly Concluded That The District Court Did Not Err In Failing To Grant The Defendant's Motion For A New Trial On The Grounds Of Newly Discovered Evidence.

In his brief to this Court, the Defendant argued that he was entitled to a new trial on the basis of newly discovered evidence, namely, the psychiatric evaluation performed by Dr. Walter Borden. See Def. Br. at 25-33. In responding to this claim, the Government argued that: (1) the evidence offered was not so material that its admission would probably lead to an acquittal; and, (2)

that the evidence could have been discovered prior to or during the Defendant's trial. See Government's Brief at 30-37 (hereinafter "Gov. Br. at __"). The Second Circuit Court of Appeals, in a Summary Order, concluded that, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, the District Court (Squatrito, J.), did not abuse its discretion in denying the Defendant's Motion for a New Trial. This Court concluded:

> We are unpersuaded that the psychiatric testimony proffered by Ruotolo after trial could not have been developed in time for its presentation at trial. Nor do we think there is any likelihood that that evidence, which was aired at a posttrial evidentiary hearing, would result in an acquittal.

See Summary Order. The Court's ruling does not recognize the true nature of the evidence offered by the Defendant. A rehearing should be ordered so that this argument may be properly considered.

In order to grant a motion for new trial based on newly discovered evidence, a court must conclude that "the evidence is material to the verdict, could not with due diligence have been discovered before or during the trial and is not cumulative." United States v. Petrillo, 237 F.3d 119, 123 (2d Cir. 2000). In affirming the district court's denial of the Defendant's motion, this Court concluded that: (1) the testimony could have been developed in time for its presentation at the Defendant's trial; and, (2) there was no likelihood that the evidence would have resulted in an acquittal. Because each of these conclusions is

incorrect, the Defendant's Petition for Rehearing should be granted.

It is important to consider the nature of the testimony which Dr. Borden was prepared to offer at a new trial and did, in fact, offer at the hearing on April 28, 1998. Tr. 2035-78. According to Dr. Borden, the Defendant suffers from "[m]asked depression ... with a mixed personality disorder with obsessive compulsive, paranoid and avoidant traits." Tr. 2176. The disorder is how the Defendant, according to Dr. Borden, deals with stress. Additionally, Dr. Borden noted that the Defendant is a:

> [r]igid person, remarkably out of touch with his own emotional life or emotional factors in others with a relatively simplistic, concrete approach to life and life's problems ... His pattern has been to absorb himself in work activities, a form of flight from his emotions. This has taken on an obsessional, compulsive quality with a preoccupation involving a narrowing of focus and over absorption in one area while inattentive to others ... What was most striking was his inability to understand interpersonal issues in himself or others in a very concrete structured framework. He appears unaware of psychological matters. This was reflected further in the assessment for his ability for abstract thinking. His responses were relatively concrete and restricted. While preoccupied and compulsive in terms of his work, real estate, house and family activities, he appears relatively unaware of details associated with those

areas.

See Def. Br. at 26-7, A-67-68.

> Dr. Borden went on testify at the hearing that:
> ... it's like on the one hand he's so obsessive that every detail is important and he doesn't differentiate. And you get so many details that after a while he can't organize is. On the one hand you get that. On the other hand, it's like important details he doesn't consider. And it's like he doesn't include.

Def. Br. at 27, Tr. 2045.

Dr. Borden eventually testified that the Defendant's mental state had been a contributing cause to the commission of the tax offenses. Tr. 2189-90. At the hearing, Dr. Borden discussed the issue with the Court as follows:

> Court: In looking at that, based on everything you've said ... tell me whether or not Mr. Ruotolo suffered from a diminished capacity that contributed to the offense in question here, which is the failure to properly document or truthfully give information on a 1988, 1989 and 1990 income tax returns?
>
> The Witness: Yes, and that's the -- really the exact wording that I would use, that it contributed. It wasn't the sole cause, but it did --.

Court: It's not a but for.

The Witness: Right. It's a [contributing] factor that -- in that it diminished his capacity to realistically totally assess his situation and his tax situation.

Court: How do you quantify his mental status per the guidelines as stated here? What are the words the guideline uses there, sir? Significant?

The Witness: It says if the defendant committed nonviolent offense suffering from significantly reduced mental capacity, and I would say that his mental capacity was significantly reduced, and constituted a contributing but not a sole factor to the commission of the offense, that -- it was significantly reduced.

Tr. 2196-97.

1. This Court Incorrectly Determined That Dr. Borden's Testimony Regarding The Defendant's Psychological Condition Could Have Been Developed Before Or During The Trial.

To prevail on a motion for new trial on the grounds of newly discovered evidence, the Defendant must show that the evidence could not have been discovered and presented prior to or during his trial.

Petrillo, 237 F.3d at 123. In the instant matter, this Court found that the evidence proffered by the Defendant could have been developed in time for its presentation at trial. Because this conclusion is incorrect, this Court should grant the Defendant's Petition for Rehearing.

In his brief, the Defendant compared his case to the case of Nagell v. United States, 354 F.2d 441 (5th Cir. 1966). In Nagell, the defendant was granted a new trial after it was determined that he, unbeknownst to both the district court and his attorneys, suffered from Anton's disease. That disease caused him to both deny that he suffered from any mental illness and to do anything he could to misled others regarding his mental disease. Id. at 448. Evidence regarding this disease was not fully explored until a post-conviction, full evidentiary hearing regarding the defendant's motion for a new trial. Id. at 446. In that case, the Fifth Circuit Court of Appeals concluded that:

> As a result of the newly discovered evidence, which the defendant concealed as a result of a damaged brain and a diseased mind, three doctors ... are now prepared to testify that in their opinions [the defendant] did not know the difference between right and wrong. This puts an entirely different face on the matter. Of course, we do not decide the merits of the case, but we believe another jury should have an opportunity to decide the guilt or innocence of this man in the light of this new evidence.

Id. at 449.

In the instant matter, a similar factual scenario has presented itself. The Defendant, according to Dr. Borden's testimony "has, for all practical purposes, no significant awareness of his underlying psychological problems." Tr. 2193. This lack of self-awareness prevented the Defendant from employing this evidence properly at his trial. The Defendant was unaware that he had any problem of a psychological nature, and was therefore unable to explore how such a problem would impact his criminal culpability. Additionally, if when this evidence is considered in light of the testimony presented at the Defendant's trial, it "puts an entirely different face on the matter." Nagell, 354 F.2d at 449. No evidence was offered to the jury regarding the Defendant's psychological condition. As the Government notes numerous times in its brief, the Defendant was acting as the "captain of his own ship." Gov. Br. at 36-7. In this matter, the Defendant, acting as captain, was unaware of the very problem which was a significant factor in his allegedly criminal behavior. Therefore, this Court erred in concluding that the Defendant should have been aware of this evidence in time to employ it at his trial.

In seeking to further its argument that Nagell is inapposite to the instant matter, the Government contends that in this case, the Defendant was made aware that his mental state was in issue when his attorney at the time, Andrew Bowman, filed a motion to determine Ruotolo's competence. Gov. Br. at 34. The Government then seems to argue that the Defendant's case is distinguishable from

Nagell because in Nagell the attorneys were never made aware of the true nature of the defendant's mental illness.[1] Despite the attempts to distinguish Nagell, a closer examination of that case reveals that it is very similar to the instant matter. In Nagell it was immediately obvious to all parties involved in the case that the defendant was suffering from some type of mental illness. Id. at 443 ("From the outset, the defendant in many ways manifested the most unusual behavior. The possibility of insanity was quickly recognized"). Based on Nagell's behavior, a competency evaluation was ordered, and he was found to be competent to stand trial. Id. at 444. Therefore, the Nagell Court considered a situation exactly analogous to the instant case -- the defendants both suffered from a mental condition which was not properly diagnosed by trial counsel.[2] Although counsel was aware at the outset of

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[1] In distinguishing Nagell, the Government stated that "In Nagell, the defendant concealed the existence of his organic brain injury from his attorneys ... Here, defense counsel - Ruotolo himself - was on notice several months prior to trial that Bowman had concerns about his mental state." Gov. Br. at 35-6.

[2] The Government implies, without stating explicitly, that because the Defendant in this case was acting as his own attorney, he could not have "hidden" his condition from himself. However, as Dr. Borden's testimony demonstrated, the exact opposite is true. The Defendant was totally unaware of his condition and the way it affected his criminal liability.

trial that such a condition might exist, it was not properly diagnosed and both defendants were deemed competent to stand trial. However, in both cases, the defendants suffered from some type of infirmity which reduced their culpability for the charged crime.

Pursuant to Nagell, this Court should conclude that the new evidence produced by the Defendant warranted a new trial. Accordingly, this Court should grant the Defendant's Petition, and accord the Defendant reargument before this panel.

2. The Court Incorrectly Determined That There Was No Likelihood That This Evidence Would Have Resulted In An Acquittal.

This evidence, if presented at the Defendant's trial, would have severely undermined the Government's argument regarding the willfulness of the Defendant's conduct. In Cheek v. Untied States, 498 U.S. 192, 201 (1991), the United States Supreme Court considered the issue of proving "willfulness" under the tax evasion statutes. In considering proof of willfulness, the Court stated:

> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty ... if the Government proves actual knowledge of the pertinent legal duty, the prosecution, without more, has satisfied the

> knowledge component of the willfulness requirement. But carrying this burden requires negating a defendant's claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws ... In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable. In this case, if Cheek asserted that he truly believed that the Internal Revenue Code did not purport to treat wages as income, and the jury believed him, the Government would not have carried its burden to prove willfulness, however unreasonable a court might deem such belief.

Id. at 201-02.

If Dr. Borden's testimony had been presented at trial, he would have bolstered the Defendant's claim regarding his misunderstanding of the tax laws. This would have substantially increased the likelihood of the jury concluding that the Defendant was honestly mistaken in his misunderstanding of the tax laws. The jury would have understood that the Defendant was a workaholic, but, nevertheless was unaware of many of the details underlying his work. The jury would have been in a much better position to consider the Defendant's specific psychological make up and how such a mental state

affected the Defendant's ability to properly process and file his income tax returns. Additionally, this testimony would have placed the Defendant's claims regarding his misunderstanding of the tax laws in the proper focus. It is highly probable that the introduction of Dr. Borden's testimony at the Defendant's trial would have resulted in an acquittal. Therefore, this Court should grant the Defendant's Petition for Rehearing and should reconsider the arguments presented by the Defendant regarding Dr. Borden's testimony.

B. This Court Erred In Concluding That The Defendant's Due Process Rights Were Not Violated By The Criminal Investigation Division's Failure To Grant Him A Conference.

In this matter, the Defendant requested a Criminal Investigation Division ("CID") Conference with the Internal Revenue Service, pursuant to Internal Revenue Service's Statement of Procedural Rules 5 § 301.552. That request was made on March 4, 1993. Def. Br. at 36. This conference was postponed by mutual agreement until information regarding the audit/investigation of the Defendant requested pursuant to the Freedom Of Information Act ("FOIA") was received from the IRS. While both sides were awaiting this information, the Defendant's case was transferred to the IRS-District Counsel level with a recommendation that the Defendant be prosecuted for willful attempted evasion of income taxes for the years 1988, 1989 and 1990. A hearing was never held at the CID level, nor was the Defendant ever

again offered the opportunity to have a hearing held at the CID level. Def. Br. at 36-7. This denial of such a hearing violated the Defendant's Due Process rights, and therefore, his Petition for Rehearing should be granted.

The Internal Revenue Service's Statement of Procedural Rules under 5 § 301.552 states that:

> A taxpayer who may be the subject of a criminal recommendation will be afforded a District Criminal Investigation conference when he requests one or where the Chief, Criminal Investigation Division, makes a determination that such a conference will be in the best interests of the Government.

See 26 C.F.R. § 601.107(b)(2).

While this rule "[i]s not an officially promulgated regulation but only a statement of procedure," United State v. Thomas, 593 F.2d 615, 622 (5th Cir. 1979); nevertheless, the one mandatory aspect of the regulation is "that taxpayers under criminal investigation have a right to a conference, if they so request." Einhorn v. DeWitt, 618 F.2d 347, 348-49 (5th Cir. 1980). In discussing the obligations imposed on the IRS by the CID procedures, one Court has stated:

> The sole obligation imposed on the IRS by § 601.107(b)(2) - and the only corresponding right that could be said to be conferred on taxpayers - is the granting of a district intelligence conference at the request of the taxpayer. The district intelligence conference is primarily for the convenience of the Internal Revenue Service so

> that it may orderly process potential criminal cases and segregate those not warranting prosecution. At least one of the purposes of the conference is to begin an informal 'give and take' process ...

John Doe Corp. v. Miller, 499 F. Supp. 378, 381 (E.D.N.Y. 1980).

In considering the Defendant's claim on appeal, this Court concluded that "Ruotolo was afforded the opportunity to attend a CID conference and that he instead sought an indefinite postponement." The Court went on to state that the district court had "properly concluded that the IRS's denial of his request for such a postponement did not violate his due process rights." See Summary Order. These conclusions ignore the main thrust of the Defendant's argument on appeal - the failure to provide a CID conference violated his Due Process rights. Therefore, the Defendant respectfully requests that a rehearing be granted by this Panel.

The Defendant respectfully submits that this is an issue of first impression in this Circuit, and as such it must be more carefully addressed by this Court. In reaching its conclusion that no Due Process violation occurred (a conclusion which was affirmed by this Court), the District Court relied on two cases, United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975) and United States v. Goldstein, 342 F. Supp. 661 (E.D.N.Y. 1972). See United States v. Ruotolo, 3:95-CR-30 (DJS)(District of Conn., June 30, 1995). Because each of these cases is distinguishable from the instant matter, this Court should grant the Defendant's Petition and reconsider the merits of

his argument.

In United States v. Stofsky, 527 F.2d at 249, the Court considered an argument similar to the one now raised by the Defendant, and concluded that:

> The failure of the government to afford [the defendants] an administrative conference with the IRS before indictment did not nullify the grand jury actions. The grand jury's broad powers to investigation and indict on the basis of the evidence which disclosed reasonable grounds for belief that the defendants violated 26 U.S.C. § 7201, are not conditioned on the taxpayers being given an opportunity to explain their conduct to a government official any more than to the grand jury itself.

Id. at 249 (internal citations and quotations omitted). The Court then went on to note that "the IRS regulation providing for such administrative conferences, 26 C.F.R. § 601.107(b)(2), was not in effect at the time of the filing of the indictment." Id. The lack of this regulation distinguishes Stofsky from the instant matter. At the time the Defendant requested his CID Conference, the IRS, pursuant to the operation of 26 C.F.R. § 601.107(b)(2), was obligated to provide the Defendant with such a conference. When the Stofsky Court considered a similar claim the Court concluded that the regulation was not effective at the time of the indictment, and therefore there was no corresponding right to such a conference.[3]

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[3] In its brief, the Government claimed that the Stofsky

However, in the instant matter, a regulation was in effect which affirmatively provides the Defendant with the right to a CID conference whenever such a conference is requested. The Government, in failing to provide the Defendant with a hearing which it affirmatively provided for, violated the Defendant's due process rights. A contrary determination, based on factually distinguishable cases, should not be allowed to stand. Therefore, this Court should grant the Defendant's petition and order a rehearing before this panel.

Additionally, the District Court improperly relied on United States v. Goldstein, 342 F. Supp. 661 (E.D.N.Y. 1972) in support of its conclusion that the Defendant's due process rights were not violated by the failure to provide him with a CID Conference. In Goldstein, the defendant did not rely on the Code of Federal Regulation which the Defendant in this case relied on. Instead, the defendant in Goldstein requested conferences with the special agent involved in the case and the Regional Commissioner Intelligence. Id. at 664. The Court noted that these conferences were discretionary and

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Court was incorrect in its belief that § 601.107(b)(2) was enacted after the defendant was indicted in that case. Gov. Br. at 21 n.5. Even if the Court incorrectly concluded that the regulation had not yet been adopted, the Court assumed that it was not when it reached its conclusion in the case. The Court did not consider the impact that regulation had on the defendants' claims in Stofsky. Therefore, the District Court's reliance on Stofsky is misplaced.

the later conferences were "described in manuals (for official use only), and [were described] in terms of practice or discretion." Id. (emphasis added). In the instant matter, the conference to which the Defendant was entitled was mandatory. Therefore, the Goldstein case is inapposite to this matter, and should not have been relied on by the District Court. Accordingly, the Defendant's Petition for Rehearing should be granted, and this Panel should reconsider its earlier decision.

The IRS has created a procedure whereby a taxpayer is afforded, upon his request a CID conference. See 26 C.F.R. § 601.107(b)(2). Such conferences, while mainly being conducted for the benefit of the IRS, are also designed to provide "the taxpayer with substantial protection against the hasty or overzealous judgment of the special agent." United States v. LaSalle National Bank, 437 U.S. 298, 315 (1978) (noting importance of protections and discussing method of obtaining a hearing). The Government, without ever informing the Defendant of their intention to do so, simply forfeited the Defendant's hearing on the grounds of expedience. The Defendant was never informed that he would lose the right to this hearing if it he did not take advantage of it within a certain time frame. No waiver can be implied in such a case. See Moser v. United States, 341 U.S. 41, 47 (1951) ("Considering all the circumstances of the case, we think that to bar petitioner, nothing less than an intelligent waiver is required by elementary fairness. To hold otherwise would be to entrap petitioner"). In the instant matter, the Defendant's due process rights were violated when his CID hearing was not conducted. Therefore, this

Court should grant the Defendant's Petition and reconsider the Defendant's claims.

III. Conclusion

This Court erred in concluding that: (1) a new trial was not warranted on the basis of the newly discovered evidence presented by the Defendant; and, (2) that the Defendant's due process rights were not violated by the Government's failure to afford the Defendant with a CID Conference as required by their regulations. Because these conclusions were in error, this Court should grant the Defendant's Petition, and conduct a rehearing of the matter before this panel.

The Defendant,
Michael Ruotolo

BY\s_____

HUBERT J. SANTOS
Federal Bar No. ct00069
SANTOS & SEELEY, P.C.
Hartford, CT 06106
tel. no. (860) 249-6548

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed, first class and postage prepaid, this 25th day of June, 2001 to:

Jonathan Biran
Assistant U.S. Attorney
U.S. Attorney's Office
157 Church Street, 23rd Floor
New Haven, CT 06508

David X. Sullivan, Esq.
Assistant U.S. Attorney
U.S. Attorney's Office
157 Church Street, 23rd Floor
New Haven, CT 06508

\s_____
HUBERT J. SANTOS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, 10007

ROSEANN B. MACKECHNIE
CLERK

As a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of July two thousand one.

Present:

Hon. JAMES L. OAKES,
Hon. AMALYA L. KEARSE,
Hon. JOSE A. CABRANES,
CIRCUIT JUDGES,

UNITED STATES OF AMERICA,
Appellee,

v. Docket no. 99-1088

MICHAEL RUTOLO,
Defendant-Appellant.

A petition for panel rehearing having been filed herein by Michael Rutolo.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By \s_____
Administrative Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CR. NO. 3:95CR00030 (DJS)
UNITED STATES OF AMERICA
V.
MICHAEL RUOTOLO
MAY 19, 1997

AMENDED MOTION FOR A NEW TRIAL

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, the Defendant moves for a new trial on the ground of newly discovered evidence and on the further ground that the interests of justice require a new trial.

The facts and authorities is support of the motion more fully appears in the accompanying memorandum.

The Defendant,
Michael Ruotolo

BY\s_____
HUBERT J. SANTOS
Federal Bar No. ct00069
SANTOS & SEELEY, P.C.
Hartford, CT 06106
tel. no. (860) 249-6548

1/29/1999 DENIED
/s/ Dominic J. Squatrito
U.S.D.J.

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing was mailed, first class and postage prepaid, this 19th day of May, 1997 to:

Barbara Bailey Jongbloed
Deputy Chief, Criminal Division
U.S. Attorney's Office
157 Church Street, 23rd Floor
New Haven, CT 06508

David X. Sullivan, Esq.
Assistant U.S. Attorney
U.S. Attorney's Office
157 Church Street, 23rd Floor
New Haven, CT 06508

Virginia Swisher
Senior U.S. Probation Officer
U.S. District Court, Probation Department
Connecticut Financial Center
157 Church Street, 22nd Floor
New Haven, CT 06510

\s_____
HUBERT J. SANTOS

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA, Plaintiff,	:
V.	:
CASE NO. 3:95-CR-30(DJS)	:
MICHAEL RUOTOLO Defendant.	:

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter is now before the court on the motion to dismiss the indictment filed by Defendant, Michael Ruotolo ("Ruotolo"), on April 17, 1995. See Fed. R. Crim. P. 12.

An evidentiary hearing was held and oral argument was heard on June 28, 1995.[1] For the reasons stated below, Ruotolo's motion to dismiss is denied.

II. BACKGROUND

On February 28, 1992, the IRS Examination

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[1] At the hearing, the court heard the testimony of Internal Revenue Service ("IRS") Special Agent Lisa Kennedy ("SA Kennedy") and IRS-District Counsel Attorney Michael Breton ("Breton"). The court finds both of there testimony to be credible.

Division referred a tax evasion case against Ruotolo to the IRS Criminal Investigation Division ("CID") for further investigation. Government ("Gov.") Ex. O ¶ 5. In a letter dated March 4, 1993, Attorney V. James Ferraro ("Attorney Ferraro"), Ruotolo's counsel, wrote Michael Dreiblatt ("Drieblatt"), chief of the CID for the federal district of Connecticut, requesting a conference. Gov. Ex. 1; Defendant's ("Def.") Ex. A. In a letter dated March 11, 1993, Dreiblatt advised Attorney Ferraro that the CID did not conduct conferences at the end of a criminal investigation. Gov. Ex. B; Def. Ex. B. He further informed counsel that his client had declined to speak with SA Kennedy and had invoked his Fifth Amendment privilege against self-incrimination. Id.

In a letter dated March 19, 1993, Attorney Ferraro repeated his request for a CID conference and cited 26 C.F.R. § 601.107(b)(2).[2] Gov. Ex. C; Def. Ex. C. On March 23, 1993, Dreiblatt sent Attorney Ferraro a letter in which he advised him that a CID conference would be scheduled for Ruotolo. Gov. Ex. D; Def. Ex. D. In a letter dated July 27, 1993, Supervisory Special Agent Peter Judge ("SSA Judge") notified Attorney Ferraro that the conference was scheduled for August 5, 1993 at the CID office in Hartford, Connecticut. Gov. Ex. E; Def. Ex. F.

By letter dated July 30, 1993, Attorney Ferraro

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[2] 26 C.F.R. § 601.107(b)(2) states in pertinent part:

> A taxpayer who may be the subject of a criminal recommendation will be afforded a district intelligence conference when he requests one ...

requested that the August 13, 1993 conference be rescheduled. Gov. Ex. F. Subsequently, in a letter dated August 2, counsel requested that SSA Judge postpone the conference until after the resolution of Ruotolo's Freedom of Information Act ("FOIA") case. Gov. Ex. G; Def. Ex. G. On August 4, SA Kennedy telephone Attorney Ferraro and informed him that because the investigation of Ruotolo's tax years 1988, 1989 and 1990 was nearly completed, the Special Agent Report ("SAR") would be forwarded to IRS-District Counsel and there would be no further need for a CID conference because the CID would no longer be involved. See Gov. Ex. H. Attorney Ferraro told SA Kennedy he understood and that he would send a letter to confirm their conversation. Id.

However, his confirmation letter dated August 5, 1993 did not match Kennedy's understanding of their conversation. In the letter, Attorney Ferraro stated that, per their conversation, they had "agreed to postpone indefinitely the CID conference" and that it would be rescheduled after Ruotolo received the FOIA information. Gov. Ex. I; Def. Ex. H.

On February 15, 1994, the SAR was transmitted from CID to IRS-District Counsel. Gov. Ex. M. ¶ 3. In a letter dated February 25, 1994, Attorney Breton offered Ruotolo a conference with his offices. Gov. Ex. J; Def. Ex. I. He tentatively set a conference for March 4 and requested that Ruotolo telephone to either confirm or reschedule the conference. Id. In response, Ruotolo, via a letter dated March 3, demanded that his case be sent back to the CID, so that office could hold a conference. Gov. Ex. G; Def. Ex. J.

In a letter dated March 8, 1994, Assistant District Counsel Bradford A. Johnson ("Johnson") informed Ruotolo that CID no longer had jurisdiction over his case and that a conference with CID was no longer available. Gov. Ex. L: Def. Ex. K. On March 18, Ruotolo made an additional request for a CID conference. Gov. Ex. M ¶ 8. However, he never contacted the District Counsel to reschedule a conference with that office. Id. ¶ 9; Def. Ex. M.

On March 25, 1994, IRS-District Counsel referred Ruotolo's case for tax years 1988, 1989 , and 1990, to the Untied States Department of Justice ("DOJ") with a prosecution recommendation. Gov. Ex. M ¶ 10; Def. Ex. N. On February 15, 1995, a federal grand jury in Connecticut returned a three count indictment against Ruotolo on charges of tax evasion in violation of 26 U.S.C. § 7201. He was arraigned on February 21, 1995 and plead not guilty. This motion followed.

III. DISCUSSION

Ruotolo contends that the indictment should be dismissed because (1) his Fifth Amendment due process rights were violated by the IRS's failure to hold a conference with the CID, as required by 26 C.F.R. § 601.107(b)(2); (2) SA Kennedy in fact postponed the conference; and (3) he should have been informed that the CID did not intend to postpone the conference until after his FOIA case was resolved. The court does not agree.

The Second Circuit as well as several district courts within the circuit have concluded that a defendant's due process rights are not violated by the failure of the government to hold an administrative conference pursuant

to § 601.107(b)(2). United States v. Stofsky, 527 F.2d 237, 249 (2d Cir. 1975); John Doe Corp. v. Miller, 499 F.Supp. 378, 381-82 (E.D.N.Y. 1980); United States v. Stofsky, 409 F.Supp. 609, 619 (S.D.N.Y. 1973); aff'd, 527 F.2d 237 (2d. Cir. 1975); United States v. Goldstein, 342 F. Supp. 661, 666 (E.D.N.Y. 1972). See United States v. Thomas, 593 F.2d 615, 622 (5th Cir. 1979); United States v. Daly, 481 F.2d 28, 30-31 (8th Cir. 1973).

In Stofsky, the Second Circuit, per Judge Mansfield, recognized that:

> The failure of the government to afford [defendants] an administrative conference with the IRS before indictment d[oes] not nullify the grand jury's actions. The grand jury's broad powers to investigate and indict on the basis of evidence which disclosed reasonable grounds for belief that the defendants violated 26 U.S.C. § 7201, are not conditioned upon taxpayers being given an opportunity to explain their conduct to a government official any more than to the grand jury itself.

527 F.2d at 249 (citations omitted). The court concurs in this reasoning. Ruotolo's due process rights are fully protected by a criminal trial.

With regards to Ruotolo's other arguments, SA Kennedy testified that during her August 4, 1994 telephone conference with Attorney Ferrraro she advised him that the conference could not be postponed indefinitely. As previously noted, the court finds SA

Kennedy's testimony to be credible. Moreover, because the CID was aware that Ruotolo was represented by counsel, it would have been inappropriate for the CID to contact him directly. Furthermore, the court finds that neither SA Kennedy nor the CID had a constitutional obligation to contact Attorney Ferraro.

Accordingly, Ruotolo's motion to dismiss the indictment [Doc. # 11] is DENIED. So ordered.

DONE this 30th day of June, 1995 at Hartford, Connecticut.

\s_____
DOMINIC J. SQUATRITO
United States District Judge

TESTIMONY OF DR. WALTER BORDEN
April 28, 1998 and December 3, 1998

Testimony presented at hearing on Defendant's Motion for New Trial conducted by District Court (Squatrito, J).

April 28, 1998, Page 28:
Dr. Borden:

> ... the basic issue was a form of depression, which I have termed a masked depression, in that he wasn't fully aware of it.
>
> * * * * *
>
> And what he presented with was more what we term a mixed personality disorder. There were obsessive-compulsive features, and avoidant traits.

April 28, 1998, Page 36:
Dr. Borden:

> You know, it's like on the one hand he's so obsessive that every detail is important and he doesn't differentiate. And you get so many details that after a while he can't organize it. On the one hand you get that. On the other hand, it's like important details he doesn't consider. And it's like that he doesn't include.

December 3, 1998, Page 7:
Dr. Borden:

> Well, as I testified previously, the basic psychiatric

diagnosis is what I would term a masked depression. I have to clarify what that involves. I noticed in the guidelines the use of the term depressive neurosis and that's an older term.

December 3, 1998, Pages 20-21:

Defense Counsel:

Doctor, did you reach a conclusion as to whether or not these conditions you've described concerning Mr. Ruotolo's mental status in your diagnosis was a contributing cause to the commission of the tax offenses during the time periods that I've already referred to?

Dr. Borden:

Yes.

Q. And what's that opinion?

A.

As I said, his mental condition isn't the sole cause but it certainly is a contributing cause in this sense. His ability to assess his situation and his business situation and his tax situation, his ability to assess that was being reduced, was diminished. His focus was more, was more and more concrete on his physical work. He was losing sight of the big picture.

December 3, 1998, Page 24:

Dr. Borden:

Of inside awareness of his psychological problems. If anything, he has a need to deny them. And he – in my opinion, he has, for all practical purposes,

no significant awareness of his underlying psychological problems.

December 3, 1998, Pages 27-28:

THE COURT:

Now just keep that, sir. In looking at that, based on everything you've said, would you please take a look at that – I don't have the exact duplicate in front of me, but would you please take a look at that and tell me whether or not Mr. Ruotolo suffered from a diminished capacity that contributed to the offense in question here, which is the failure to properly document or truthfully give information on a 1988, 1989 and 1990 income tax returns?

Dr. Borden:

Yes, and that's the – really the exact wording that I would use, that it contributed. It wasn't the sole cause, but it did –

THE COURT:

It's not a but for.

THE WITNESS:

Right. It's a distributing factor that – in that it diminished his capacity to realistically totally assess his situation and his tax situation.

THE COURT:

How do you quantify his mental status per the guidelines as stated here? What are the words the guideline uses there, sir? Significant?

THE WITNESS:

It says if the defendant committed nonviolent

offense suffering from significantly reduced mental capacity, and I would say that his mental capacity was significantly reduced, and constituted a contributing but not a sole factor to the commission of the offense, that – it was significantly reduced.